Supreme Court, U.S.
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No. _____

IN THE
**SUPREME COURT OF THE UNITED STATES**

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DAVID REX YEAMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. What is the proper test for courts of appeals to use when applying the abuse-of-discretion standard of review to departures under the United States Sentencing Guidelines ("Guidelines")?

2. Can courts of appeals use policy or other considerations to disqualify an unmentioned factor as a basis for departing from the Guidelines?

## PARTIES TO THE PROCEEDING

United States of America
David Rex Yeaman
Nolan Leigh Mendenhall

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## OPINIONS BELOW

The opinion of the court of appeals is reported at 248 F.3d 223 (3d Cir. 2001) and is reproduced in the Appendix ("App.") at pages 3a-31a. The order of the court of appeals Sur Petition for Rehearing is reproduced at App. 47a-48a. The district court did not issue a written opinion, but its Judgment in a Criminal Case is reproduced at App. 32a-46a.

## JURISDICTION

The court of appeals issued its Judgment and Opinion on April 26, 2001. (App. 1a-31a.) The court of appeals issued its order Sur Petition for Rehearing on June 18, 2001. (App. 47a-48a.) On September 12, 2001, Justice Souter extended the time for filing a petition for a writ of certiorari to and including November 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The text of 18 U.S.C. § 3553(a) and 18 U.S.C. § 3553(b) is reproduced at App. 49a-51a.

The text of 18 U.S.C. § 3742(e) is reproduced at App. 52a.

The text of U.S.S.G. § 5K2.0 is reproduced at App 53a-56a.

## STATEMENT OF THE CASE

The basis for the district court's jurisdiction is 18 U.S.C. § 3231. The basis for the court of appeals' jurisdiction is 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b).

On February 7, 1996, Petitioner David Yeaman was indicted in the Eastern District of Pennsylvania and charged with conspiracy, wire fraud, and securities fraud in connection with his indirectly leasing shares of worthless stock to an escrow account as purported surplus assets for World Life and Health Insurance Company of Pennsylvania. The case was tried before The Honorable Clarence C. Newcomer and, on April 16, 1997, the jury returned a verdict acquitting Mr. Yeaman of two counts of wire fraud and convicting him of the remaining conspiracy, wire fraud, and securities fraud counts.

On January 22, 1998, the district court sentenced Mr. Yeaman to fourteen months imprisonment, three years supervised release, and a fine. On March 3, 1998, Mr. Yeaman reported to the Federal Prison Camp at Nellis Air Force Base ("Nellis FPC") to begin serving his term of imprisonment. He went through the various challenging psychological steps that accompany entering a confinement facility – adjusting to the drastic change in one's surroundings and lifestyle, reaching and passing the temporal half-way point of one's confinement, and, finally, preparing for reintegration into the community.

Meanwhile, his appeal stagnated due to extraordinarily unusual delays in the preparation of the trial transcript. Though ordered immediately, and originally due on April 13, 1998, the transcript still had not been filed by June 15, 1998. Accordingly, the clerk of the court of appeals issued to the court reporter an order to show cause for why she should not be held in contempt. Though the order was returnable on June 25, 1998, the court reporter failed to respond. Finally, in September 1998, the court reporter completed the transcript except for two of the trial dates for which the audio tapes of the proceedings could not be located at the time. In November 1998,

Mr. Yeaman's counsel wrote to the district court clerk to inquire as to whether the audio tapes had been irretrievably lost, in which case counsel would consider what steps to take under Fed. R. App. P. 10(c). Upon learning two weeks later that one of the audio tapes was irretrievably lost (while the other had been found), Mr. Yeaman's counsel immediately circulated to the government a Fed. R. App. P. 10(c) Statement of the Trial Proceedings for the missing day in an effort to reconstruct the missing day so as to enable the appeal to proceed. Shortly thereafter, all parties filed a Stipulated Fed. R. App. P. 10(c) Statement of the Trial Proceedings for the missing day, the district court entered an order approving that statement, and Mr. Yeaman filed his appeal brief two weeks later. The government appealed the sentence.

Mr. Yeaman remained confined during that entire period. While incarcerated, he began to manifest a recognition of his own misconduct, and, in stark contrast to his almost entire adult history of testing the boundaries of regulations and challenging those in positions of authority, he demonstrated an enthusiastic compliance with both the letter and spirit of prison rules and received outstanding evaluations from his prison-related supervisors. (See Joint Appendix to the court of appeals briefs at 263a-264a, 348a-349a, 353a-367a.)

On January 8, 1999, the Bureau of Prisons transferred Mr. Yeaman from Nellis FPC into the custody of Cornell Corrections, a community confinement center, to complete the balance of his term of imprisonment, and, on March 8, 1999, Mr. Yeaman was released from Cornell Corrections. Following his release, he resumed frequent contacts with his family (particularly his older daughter, son-in-law, and grandson, all of whom he lived with upon

his release) and managed his family's cattle ranch. (See id. at 331a-333a.)

Several months after his release, the court of appeals issued an order and opinion affirming his conviction and remanding the case to the district court. The resentencing hearing took place on April 10, 2000. There, the parties and the court discussed essentially three potential grounds for downward departure: Mr. Yeaman's extraordinary rehabilitation since his previous sentencing, the unusual harshness of his being resentenced and potentially reincarcerated more than one year after he had been released from confinement for the same offense, and unwarranted Guidelines disparity relative to co-conspirators. With respect to the first ground, the government acknowledged that a downward departure "may be applicable to this unique circumstance of the defendants having served their period of incarceration" (id. at 166a-167a), but disagreed with the proposed magnitude of the departure. The parties also discussed restitution before agreeing that Mr. Yeaman would pay $1.5 million to the Statutory Liquidator for World Life Insurance Company over the course of his remaining two years of supervised release. (See id. at 169a-221a.) (Since the hearing, Mr. Yeaman has made all payments according to the schedule agreed to and ordered at the hearing; he is scheduled to make his final payment on January 10, 2002.) Mr. Yeaman then apologized to the court, the victims, the government, and his family for his wrongful conduct. (See id. at 222a-226a.) Finally, the court granted the downward departures and sentenced Mr. Yeaman to the fourteen months that he had served before his release more than one year earlier. (See id. at 228a-236a, 240a.)

The government appealed, arguing both that departing was improper as to each ground and that the

degree of the departure was unreasonably large. After briefing was completed, the court of appeals ordered oral argument, which was held on December 14, 2000.

In an opinion issued April 26, 2001, the court reversed the departures and remanded for resentencing. With respect to the departure for extraordinary rehabilitation, a majority of the panel held that the district court abused its discretion because "nothing about Yeaman's post-sentencing conduct . . . sets it outside the heartland" and, though he clearly "is an individual with strong religious convictions who would not be inclined to engage in unlawful activity in the future," his "commendable" behavior subsequent to sentencing "makes it clear that Yeaman's conduct has not changed significantly and could have been reasonably expected based on his previous behavior." (App. 10a-11a.)

Judge Nygaard dissented. (See id. at 20a-31a.) He first explained that Mr. Yeaman "went 'above and beyond' what was required of him in prison" by, in addition to being a "model prisoner," becoming "actively involved in the prison community and focus[ing] his energies upon helping others" (id. at 23a), which, Judge Nygaard observed, was neither mandatory nor common in the prison community (id. at 24a). He next noted that "Yeaman's shift in attitude during his prison stay also supports a finding of extraordinary rehabilitation," as Mr. Yeaman, for example, "began cooperating with the United States Government for the first time," in contrast to his markedly different previous conduct. (Id. at 25a-26a.) Finally, after observing that Mr. Yeaman "is living his life differently than he did before his incarceration," Judge Nygaard concluded that, applying the deferential standard set out in Koon v. United States, 518 U.S. 81, 98 (1996), "the circumstances relied upon by the District Court are well within the 'outside

permissible limits' of extraordinary rehabilitation and are commensurate with circumstances 'found exceptional in existing case law.'" (App. 26a-27a (quoting United States v. Serafini, 233 F.3d 758, 772 (3d Cir. 2000)).)

With respect to the departure based on the circumstance of Mr. Yeaman's resentencing and potential reincarceration following his release from confinement, the court held that the circumstance did not take the case outside the heartland (and cannot alone take any case outside the heartland) because "reincarceration as a means to correct error is inherent in the process of Guideline sentencing" and endorsing the departure would be "inequitable and inconsistent with Congressional intent" and would "create[] . . . dubious inversions" of the Guidelines' goal of sentencing uniformity. (App. 16a, 17a, 18a.) Judge Nygaard did not dissent on this point, notwithstanding his belief that reincarceration in this case "is wholly unnecessary and antithetical to the historical purposes of criminal law and penology." (Id. at 20a.) Mr. Yeaman does not raise in this Petition the court of appeals' reversal of the departure based on unwarranted disparity relative to co-conspirators.

## REASONS FOR GRANTING THE PETITION

During the more than five years since this Court addressed the issue of departures under the United States Sentencing Guidelines ("Guidelines") in Koon v. United States, 518 U.S. 81 (1996), federal sentencing has been marked by "doctrinal confusion and departure disparities in the lower courts." Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines, 76 Notre Dame L. Rev. 21, 74 (2000). The "seriousness of the inter-circuit disparity that has developed in the wake of Koon" is

apparent from the circuits' widely varying rates of downward departure based on grounds other than cooperation with the prosecution. Id. at 82-83 (listing fiscal year 1998 non-cooperation downward departure rates of 3.6% within the Fourth Circuit, 6.4% within the Sixth Circuit, 4.8% within the Seventh Circuit, and 5.2% within the Eleventh Circuit, in contrast to rates of 23.4% in the Second Circuit and 29.6% in the Ninth Circuit).[1] One commentator observed that "the remarkable contrast in downward departure rates from circuit to circuit itself raises concerns about regional disparities under the Guidelines," as "[t]he goal of sentencing consistency cannot be well served when a defendant in the Ninth Circuit is nearly ten times more likely to benefit from a downward departure than a defendant in the Fourth Circuit." Id. at 83-84 (footnote omitted).

Other commentators recently pointed out that "numerous circuit conflicts have developed over important departure issues," and that "such circuit splits . . . perpetuate unwarranted sentence disparity, as offenders in some circuits have received downward departures under circumstances that do not qualify for departure in

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[1] Those disparities have persisted. See United States Sentencing Commission, 1999 Datafile, Table 8 (OPAFY99), available at http://www.ussc.gov/judpack/jp1999.htm (listing fiscal year 1999 non-cooperation downward departure rates of 4.6% within the Fourth Circuit, 6.7% within the Sixth Circuit, 7.1% within the Seventh Circuit, and 6.5% within the Eleventh Circuit, compared to rates of 19.5% within the Second Circuit and 36.4% within the Ninth Circuit); United States Sentencing Commission, Office of Policy Analysis, 2000 Datafile, Table 8 (OPAFY00), available at http://www.ussc.gov/judpack/jp2000.htm (listing fiscal year 2000 non-cooperation downward departure rates of 5.0% within the Fourth Circuit, 7.7% within the Sixth Circuit, 7.7% within the Seventh Circuit, and 6.9% within the Eleventh Circuit, compared to rates of 19.6% within the Second Circuit and 37.9% within the Ninth Circuit).

other jurisdictions. This problem is reaching alarming proportions . . . ." Michael Goldsmith & Marcus Porter, Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures, 69 Geo. Wash. L. Rev. 57, 60 (2000) (footnotes omitted). Another commentator likewise noted that, in "post-Koon downward departure cases decided by the various United States courts of appeals[,] . . . the identity of the reviewing court is often all too important in determining the outcome, a problem the Guidelines' goal of uniformity meant to resolve." Ian Weinstein, The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines, 79 B.U. L. Rev. 493, 549 (1999).

The inconsistent appellate outcomes stem from at least two sources. The first is the absence of a common, uniform test for assessing whether a sentencing court has abused its discretion in granting a departure. This Court held in Koon that the courts of appeals must apply an abuse-of-discretion standard to assess whether federal district courts have properly departed from applicable Guideline ranges when imposing sentences. Koon, 518 U.S. at 98-100. The various courts of appeals have struggled, however, with the question of how to define and apply the deference required by that standard. As a result, appellate review of federal sentencing departures has been and continues to be marked by conflicting precedent and inconsistent results. In this case, a majority of the panel below eschewed an objective test for reviewing departures and ruled, over a dissent and without analyzing relevant case law, that the district court had abused its discretion in finding that Mr. Yeaman's rehabilitation was extraordinary.

The second source of appellate inconsistency involves whether appellate courts can forbid a sentencing

factor from taking a case outside the Guidelines' heartland when the United States Sentencing Commission ("Commission") has not done so. Although this Court and the en banc Sixth Circuit have held that only the Commission can do so, the opinion below nevertheless holds, largely on policy grounds, that the admittedly unique circumstance of being resentenced and potentially reincarcerated after one's release from prison for the same offense cannot itself take a case outside the heartland and allow for a departure.

Thus, this case presents a rare opportunity for this Court to clarify two of the areas that have led to the circuit courts' tangled departure jurisprudence.

## I. THE ABSENCE OF A UNIFORM TEST FOR ASSESSING WHETHER A SENTENCING COURT HAS ABUSED ITS DISCRETION IN GRANTING A DEPARTURE HAS CREATED CONFLICTING PRECEDENT AND DISPARATE RESULTS.

Since this Court issued its opinion in Koon, the various circuit courts have struggled in applying the abuse-of-discretion standard articulated in that case for assessing departures from the Guidelines. As explained below, this confusion has led to inconsistent decisions both between and within circuits. Although the Third Circuit had adopted a disciplined, objective test to help its panels apply the standard, the majority below abandoned that test – which asked whether the departure at issue was far removed from those found acceptable in existing case law – in favor of a subjective test and reversed the district court's downward departure for Mr. Yeaman's extraordinary rehabilitation. Contrasting the majority's opinion with Judge Nygaard's dissenting opinion and comparing this

case to those in other circuits highlights the arbitrary and inconsistent nature of departure reviews conducted without clear tests.

### A. The Courts Of Appeals Have Reached Inconsistent Results In Reviewing Guideline Departures Under Koon's Abuse-Of-Discretion Standard.

Although this Court in Koon identified abuse of discretion as the proper standard for reviewing Guideline departures, the circuit courts have produced conflicting opinions and outcomes in departure appeals due to the lack of a common test for applying that standard. As one commentator has explained, the "adoption of the abuse of discretion standard without explanation of how to apply it has . . . deepened decisional inconsistency," as "the circuit courts . . . have not developed a doctrine about how and when district courts should use their limited discretion." Weinstein, 79 B.U. L. Rev. at 495, 496-97. Accordingly, there has been "ample room for the circuit courts of appeals to go their own way, as they have since Koon was decided." Id. at 516. Examples of the inconsistent results appear in, inter alia, appellate decisions involving downward departures for family circumstances and community service, as explained below.

Family circumstances downward departures have received conflicting appellate treatment between, and even within, circuits. For example, while the Second Circuit (over a dissent) has affirmed a downward departure based on the defendant's being the sole source of financial support for his two children due to his wife's limited earning capacity (because she spoke little English), see United States v. Galante, 111 F.3d 1029, 1037 (2d Cir. 1997), the Fourth Circuit has reversed a downward

departure that was based on the defendant's having a wife with fragile mental health and a nine-year-old son with neurological problems who was in need of special supervision, see United States v. Rybicki, 96 F.3d 754, 758-59 (4th Cir. 1996). Similarly, the Seventh Circuit has affirmed a downward departure based on the defendant's care of his and his common-law wife's three children after school (such as helping them with their homework) and his spending time with his brother who suffered from Down's Syndrome, see United States v. Owens, 145 F.3d 923, 926, 929 (7th Cir. 1998), but the Third Circuit has reversed a downward departure that was based on the defendant's being a single mother and the sole provider for five children, one of whom suffered from a neurological disorder (Tourette's Syndrome), see United States v. Sweeting, 213 F.3d 95, 101-02 (3d Cir.), cert. denied, 531 U.S. 906 (2000).

Such seemingly inconsistent (if not inverted) results appear even within the same circuit. For example, in United States v. Gauvin, 173 F.3d 798 (10th Cir.), cert. denied, 528 U.S. 906 (1999), one panel affirmed a downward departure based on the need for the defendant's wife to work sixteen-hour days during his incarceration to provide for their four children and make her car payments, and based on the related risk of the housing authority's taking custody of their children. Id. at 808. In United States v. Archuleta, 128 F.3d 1446 (10th Cir. 1997), however, a different panel vacated a downward departure that had been based on the defendant's being the sole supporter and caregiver for his two children and his elderly, diabetic mother. Id. at 1447, 1451.

Community service downward departures, too, have received conflicting appellate treatment even intra-circuit. For example, within the Eighth Circuit, one panel ruled,

over a dissent, that a district court abused its discretion in departing downward for community service that included the defendant's advising local business owners, hiring young people, serving on his church council, and raising money for charity, see United States v. Morken, 133 F.3d 628, 630 (8th Cir. 1998), while another panel later held, without discussing Morken, that a district court did not abuse its discretion in departing downward based on a different defendant's charitable activity of bringing a former employee and the defendant's niece into her home and paying for their private high school and helping to care for an elderly friend whom she helped move from a nursing home to an apartment, see United States v. Woods, 159 F.3d 1132, 1136-37 (8th Cir. 1998).

The above examples of conflicting case law highlight the need for a uniform test for reviewing Guideline departures. As explained below, this case would be an appropriate vehicle for this Court to articulate such a test.

**B. By Abandoning The Third Circuit's Objective Test For Determining Whether A Departure Involved An Abuse Of Discretion, The Court Below Added To The Growing Body Of Conflicting Appellate Case Law.**

Prior to its opinion in this case, the Third Circuit had employed a disciplined, objective test for assessing whether sentencing courts had abused their discretion in granting departures based on factors that are discouraged or encouraged but already taken into account in the Guidelines: "Our review is limited to ensuring that the circumstances relied upon by the District Court are not so far removed from those found exceptional in existing case

law that the sentencing court may be said to be acting outside permissible limits." United States v. Serafini, 233 F.3d 758, 772 (3d Cir. 2000) (internal quotation marks omitted). As the court recognized, id., this existing-case-law test was consistent with this Court's directive in Koon that "[w]hether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases." Koon, 518 U.S. at 98. Other courts have endorsed the test as well. See United States v. Faria, 161 F.3d 761, 762, 763 (2d Cir. 1998) (articulating test and reversing downward departure based on facts that were "far less grave" than those that led the court to approve downward departures in three analogous cases); United States v. Hairston, 96 F.3d 102, 108 (4th Cir. 1996) (reversing downward departure for extraordinary restitution where appellate court found "no case in which such a small percentage in restitution ha[d] been held to constitute an exceptional circumstance").

The majority opinion below, however, summarily concludes that Mr. Yeaman's rehabilitation was not extraordinary, without comparing his rehabilitation to that present in existing case law and without distinguishing case law that supports the district court's finding that his rehabilitation was extraordinary. The majority's one-paragraph discussion of Mr. Yeaman's rehabilitation efforts cites no cases, as it merely opines that his preexisting religious beliefs and his positive behavior subsequent to sentencing "make[] it clear that Yeaman's conduct has not changed significantly and could have been reasonably expected based on his previous behavior." (App. 11a.) The majority thus jettisoned the objective existing-case-law test in favor of a conclusory statement of those panelists'

beliefs, the subjectivity of which is seen from Judge Nygaard's dissent, which demonstrates that the answer was not "clear" (id.) to him at all. (See id. at 23a-27a (Nygaard, J., dissenting); see also id. at 23a ("I . . . think that Yeaman has made 'concrete gains toward turning his life around.' . . . First, Yeaman went 'above and beyond' what was required of him in prison."); id. at 26a-27a ("[W]hile in prison and after his release, Yeaman demonstrated a genuine commitment to moral principles and values. He is living his life differently than he did before his incarceration. . . . This sort of notable change should not be underestimated. In this case, it indicates an extraordinary effort at rehabilitation.").)

In addition to identifying no cases that conflict with the district court's departure, the majority opinion fails to distinguish cases that support the departure. In United States v. Green, 152 F.3d 1202 (9th Cir. 1998), the Ninth Circuit affirmed a downward departure for extraordinary rehabilitation based on the defendant's having actively engaged in his first 1300 hours of a previously imposed community service requirement. See id. at 1205 & n.1, 1208 ("While Green was required to do community service, there was no requirement that he actively engage himself in that experience . . . or go 'above and beyond' in his work there."). Although Mr. Yeaman, too, went, in Judge Nygaard's words, "'above and beyond' what was required of him in prison" by becoming "actively involved in the prison community and focus[ing] his energies upon helping others" (App. 23a), the majority's attempt to distinguish the two cases consists only of stating that Green's "involvement might be seen as extraordinary and is distinguishable from Yeaman's conduct, which does not demonstrate extraordinary initiative or change in behavior" (id. at 11a-12a n.2). That conclusory analysis fails to explain how Green's conduct was distinguishable from

Mr. Yeaman's, as the Ninth Circuit opinion suggests neither any "initiative" by Green, whose community service was court-ordered, nor heightened "change" in Green relative to that described in Judge Nygaard's dissent with respect to Mr. Yeaman (see id. at 25a-26a (explaining that Mr. Yeaman achieved a "shift in attitude during his prison stay," as he "recognized his own shortcomings and accepted responsibility for his actions" and "also began cooperating with the United States Government for the first time," whereas, "[i]n the past, Yeaman butted heads with the United States Government, and tested the regulators in Washington and throughout the country continually" (internal quotation marks and alteration marks omitted))).

Similarly, the majority opinion below does not respond to Judge Nygaard's discussion of the First Circuit's holding that assisting and educating others in prison, as Mr. Yeaman did, is a basis for an extraordinary rehabilitation departure. (See id. at 24a-25a (discussing United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000)).)

The majority's failure to apply the Third Circuit's test, failure to cite case law in support of its holding, failure to distinguish case law that undermines its holding, and failure otherwise to provide any detailed reasoning behind its holding demonstrates both that the majority erred and that the absence of a required, objective test for reviewing departures has transformed the abuse-of-discretion standard into a vehicle through which appellate courts simply substitute their judgment for that of sentencing courts. Cf. Koon, 518 U.S. at 98 ("District courts have an institutional advantage over appellate courts in making these sorts of determinations."). Accepting certiorari here would allow this Court not only to correct the majority's error, but also to set forth a test that halts the pattern of

conflicting case law and disparate results that has prevailed since Koon was decided.

## II. THE OPINION BELOW CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' HOLDINGS BY USING POLICY AND OTHER CONSIDERATIONS TO JUSTIFY DISQUALIFYING AN UNMENTIONED FACTOR FROM TAKING A CASE OUTSIDE THE GUIDELINES' HEARTLAND.

One of the grounds on which the district court departed was the unusual circumstance of Mr. Yeaman's being resentenced for potential reincarceration more than one year after his having been released from confinement for the same offense. At the sentencing hearing, even the government acknowledged the uniqueness of that circumstance (see, e.g., App. 14a n.4), as, indeed, only two other courts have had occasion to consider the issue in the fourteen years of the Guidelines. (Both held that the factor justified departing downward. See United States v. Ray, 950 F. Supp. 363, 368 (D.D.C. 1996); United States v. DeRiggi, 893 F. Supp. 171, 174, 183, 185 (E.D.N.Y.) (Weinstein, J.), aff'd, 72 F.3d 7 (2d Cir. 1995).)

In the opinion below, however, the Third Circuit held that this ground did not warrant a downward departure, as it ruled that "error correction through reincarceration cannot alone take a case outside the heartland." (App. 19a.) The court reasoned that the circumstance was not sufficiently unusual to remove the case from the heartland because it believed that "reincarceration as a means to correct error is inherent in the process of Guideline sentencing" and that endorsing the departure would be "inequitable and inconsistent with Congressional intent" and would "create[] . . . dubious

inversions" of the Guidelines' goal of sentencing uniformity. (Id. at 17a, 18a.) As explained below, however, appellate courts are not permitted to forbid a factor's use as a departure ground, and, moreover, the court's use of the circumstance's assertedly inherent nature in the Guidelines to reject the departure impermissibly conflicts with this Court's opinion in Koon, as well as with other circuit court opinions.

### A. Appellate Courts May Not Hold That Particular Factors Cannot Take A Case Outside The Heartland.

In Koon, this Court squarely held that "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." Koon, 518 U.S. at 106. The opinion below does just that, however, by holding "that error correction through reincarceration cannot alone take a case outside the heartland." (App. 19a (emphasis added).)[2]

Indeed, the opinion exemplifies why appellate courts are not permitted to disqualify unmentioned factors, as the court relied largely on policy arguments to reach its conclusion. (See id. at 17a-18a.) This Court has explained that normative arguments, "however persuasive as a matter of sentencing policy, should be directed to the Commission." Koon, 518 U.S. at 106. Recently, this Court

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[2] The opinion's subsequent acknowledgment that extraordinary circumstances surrounding, or effects of, reincarceration could potentially provide a basis for a downward departure (see App. 19a) does not limit the scope of the court's ruling, as the acknowledgment merely expresses the obvious point that the presence of a reincarceration-following-release circumstance does not preclude a court from departing downward if other factors (such as extreme vulnerability in prison) happen to be present also.

elaborated on why sentencing policy is entrusted to the Commission rather than to appellate courts:

> [T]he Sentencing Commission itself gathers information on the sentences imposed by different courts, it views the sentencing process as a whole, it has developed a broad perspective on sentencing practices throughout the Nation, and it can, by adjusting the Guidelines or the application notes, produce more consistent sentencing results among similarly situated offenders sentenced by different courts. Insofar as greater uniformity is necessary, the Commission can provide it.

Buford v. United States, 121 S. Ct. 1276, 1281 (2001).

The Sixth Circuit, sitting en banc, recognized in United States v. Coleman, 188 F.3d 354 (6th Cir. 1999), that only the Commission can proscribe factors from supporting departures. There, the court held that the district court was required to consider whether the government's allegedly improper investigative techniques justified a downward departure, as "[t]here are a potentially infinite number of factors which may warrant a departure. Koon makes clear that a court may not categorically exclude the consideration of any one factor, and that to do so would be a transgression of the policymaking authority vested in the Commission." Id. at 358, 359. Thus, the court explained, a court "is strictly limited to determining merely 'whether the Commission has proscribed . . . consideration of the factor,' and if not, 'the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.'" Id. at 358 (quoting

Koon, 518 U.S. at 109 (alteration in Coleman)). Here, the Commission has not proscribed consideration of the resentencing-following-release factor, and the district court determined that the factor took Mr. Yeaman's case outside the heartland. The Third Circuit's reversal (based largely on policy grounds) thus conflicts with both Coleman and Koon.

The scope of the conflict is not limited to the Third Circuit, however. For example, in United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997), the Eleventh Circuit held that the loss of a professional or employment position (such as a medical license) cannot support a downward departure where the loss results from the defendant's abusing a position of trust. See id. at 1204-06. Indeed, commentators have pointed out the conflicting state of appellate case law on this issue. One article explains that "some circuits have read Koon to prohibit courts from precluding certain factors from departure consideration, while other circuits have reached the opposite conclusion. Eventually, these divergent lines of analysis produced not only circuit conflicts but conflicts within circuits." Goldsmith & Porter, 69 Geo. Wash. L. Rev. at 72-73 (footnote omitted). Thus, it is important to accept certiorari here in order to provide guidance and correct the burgeoning appellate court practice, seen in this case and others, of usurping the Commission's role by effectively forbidding certain unmentioned factors from being grounds for departures.

### B. Factors Arguably Inherent In The Guidelines Or Judicial Process Do Not Automatically Fall Outside The Heartland.

Even setting aside the Third Circuit's impermissible forbidding of an unmentioned factor as an available

departure ground in its own right, the opinion below also conflicts with Koon and other appellate courts by holding that factors "inherent in the process of Guideline sentencing" necessarily fall within every guideline's heartland. (App. 17a ("The District Court here held that reincarceration in and of itself constitutes an aggravating or mitigating factor not adequately taken into account by the Guidelines scheme. We cannot agree. Rather, reincarceration as a means to correct error is inherent in the process of Guideline sentencing.").)

In Koon, this Court expressly recognized that factors inherent in the judicial process may provide grounds for departure. Specifically, this Court upheld a departure based on the circumstance of a successive federal prosecution following a state court acquittal arising from the same underlying conduct. See Koon, 518 U.S. at 112. Although the potential for a successive trial by a different sovereign is inherent in the "dual responsibilities of citizenship in our federal system," the Court held that such successive prosecutions and the burdens they placed on the defendants were sufficient to remove the case from the Guidelines' heartland. Id.

Other circuits similarly have held that factors inherent in the judicial process can support departures. For example, in United States v. Saldana, 109 F.3d 100 (1st Cir. 1997), the First Circuit held that delay in prosecution, although often a normal part of the judicial process, may provide a basis to depart downward if it adversely affects a defendant's sentence. See id. at 104; see also United States v. Sanchez-Rodriguez, 161 F.3d 556, 564 (9th Cir. 1998) (affirming downward departure based on defendant's lost opportunity to serve a greater portion of his state sentence concurrently with his federal sentence

due to unusual delay in indicting and sentencing him on the federal charge).

The Third Circuit's conflict with the First and Ninth Circuits (as well as with Koon) reflects the prevalence of conflicts relating to departures. Commentators have noted that "circuit conflicts usually occur . . . because of disparate interpretations of the heartland of criminality. As a result, a case that is considered typical and not worthy of a departure in one circuit, may be atypical and, therefore, worthy of departure in another." Goldsmith & Porter, 69 Geo. Wash. L. Rev. at 61-62 (footnote omitted). Thus, it is important to accept certiorari here in order to provide guidance for assessing whether a factor takes, or can take, a case outside the heartland.

## CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

November 15, 2001

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-1498 and 00-1500

UNITED STATES OF AMERICA
Appellant in Nos. 00-1498 and 00-1500

v.

DAVID REX YEAMAN, Appellee in No. 00-1498
NOLAN LEIGH MENDENHALL,
Appellee in No. 00-1500

---

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. Action Nos. 96-cr-00051-3 and
96-cr-00051-6)
District Judge: Honorable Clarence C. Newcomer

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Argued December 14, 2000

BEFORE: NYGAARD AND STAPLETON, *Circuit Judges,* and DEBEVOISE,* *District Judge*

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JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Eastern District

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*Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

of Pennsylvania and was argued by counsel before this Court on December 14, 2000.

On consideration whereof, it is

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered April 17, 2000, be and the same is hereby reversed and the case is remanded for resentencing in a manner consistent with this opinion. All of the above is in accordance with the opinion of this Court.

ATTEST:
/s/ Maresa M. Waldron
Clerk

DATED: April 26, 2001

## APPENDIX B

Filed April 26, 2001

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(Opinion Filed: April 26, 2001)

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*Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

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## OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

The United States government appeals the sentences of David Yeaman and Nolan Mandenhall on several counts of mail and wire fraud. We reversed the original sentences of both defendants following a previous government appeal, finding that the District Court had failed to apply the Sentencing Guidelines properly. *United States v. Yeaman*, 194 F.3d 442, 465 (3d Cir. 1999). At resentencing, the District Court departed downward 17

levels for Yeaman and 16 levels for Mendenhall primarily because both defendants had already completed erroneously lenient sentences. The downward departures granted by the District Court resulted in no additional incarceration. We conclude that the District Court has again erred, and we will again remand for resentencing.

I.

David Yeaman and Nolan Mendenhall were convicted on several counts of mail and wire fraud arising from their participation in a fraudulent scheme involving the sale of worthless reinsurance. The details of the scheme are set forth in our opinion in *United States v. Yeaman*, 194 F.3d 442, 446-49 (3d Cir. 1999). Briefly stated, the convictions of Yeaman and Mendenhall stemmed from their leasing worthless stocks as assets available to pay insurance claims. When these assets were called upon to pay outstanding medical reinsurance claims, the scheme was uncovered. David Yeaman leased stocks which were purported to be valued at over $12 million but were in fact practically worthless. Mendenhall assisted Yeaman in leasing these falsely-valued stocks and ran the day-to-day operations of the scheme. *Id.*

Yeaman was convicted by a jury in 1997 of conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. §371, five counts of wire fraud, in violation of 18 U.S.C. §1343, and three counts of securities fraud, in violation of 15 U.S.C. §77q(a). Mendenhall was convicted of four counts of securities fraud, in violation of 15 U.S.C. §77q(a). Three co-defendants were also convicted at trial, while a sixth co-defendant pled guilty and testified against the other defendants.

At its first sentencing hearing on January 28, 1998, the District Court sentenced Yeaman to 14 months imprisonment and Mendenhall to three years probation, with Mendenhall's first 10 months to be served in community confinement. The defendants appealed these sentences and the government cross-appealed. On appeal, this Court remanded for resentencing, holding, inter alia, that the District Court had erred by finding that no loss had occurred. On remand, Yeaman and the government agreed to a modified offense level of 30, based on the $4.5 million loss incurred and other factors. This produced a sentencing range of 97 to 121 months for Yeaman, a range mandating a sentence 83 months (roughly 7 years) longer than his prior sentence. Mendenhall and the government agreed to an offense level of 26, also based on the loss and other factors. This produced a sentence range of 63 to 78 months, in comparison to a previous sentence requiring no jail time, but only community confinement.

At the resentencing hearing on April 10, 2000, the District Court found that these ranges were appropriate and that they were supported by the facts. The District Court then departed downward 17 levels for Yeaman and 16 levels for Mendenhall in order to re-impose its original sentences. Before either party had addressed the merits, the District Court made clear its intention to avoid imposing any punishment beyond the original sentences.

> Let me say at the outset that this is an unusual situation in that we have two defendants here who had been sentenced previously and who were each sentenced to periods of incarceration which they entered upon and completed and served and

> then entered upon their supervised release and their resumption of their civilian pursuits.
>
> . . .
>
> I must say, in all candor, that my view of this is that, as a judge, if he were in a position of applying justice and mercy, as it's traditionally been known, would feel that after this long delay, it is almost unconscionable to send these two defendants back to prison.

(App. 162a-66a).

After hearing arguments by the government and both defendants, the District Court re-imposed its original sentences.

## II.

The parties have suggested four bases for the District Court's downward departures: extraordinary rehabilitation, disparity in sentencing among similarly situated co-defendants, extraordinary family circumstances, and reincarceration after completion of a sentence. The government argues that on the facts of this case, a departure based on any of the above factors is unwarranted.

"We review a district court's decision to depart from the applicable Guidelines range under an abuse of discretion standard . . .." *United States v. Sweeting,* 213 F.3d 95, 100 (3d Cir. 2000), citing *Koon v. United States,* 518 U.S. 81, 98 (1996). "Our review is limited to ensuring that the circumstances relied upon by the District Court are not 'so far removed from those found exceptional in existing case law that the sentencing court may be said to be acting outside permissible limits.' " *United States v. Serafini,* 233 F.3d 758, 772 (3d Cir. 2000) quoting *Sweeting,* 213 F.3d at 100.

However, we also note that "whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point." *Koon*, 518 U.S. at 100. Thus, while we owe deference to the District Court's interpretation of the facts warranting departure in this case, we may correct the District Court's legal error if we find that it has departed based on a factor which would not warrant departure under any circumstances.

**1. Extraordinary Rehabilitation**

In *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997), we held that "post-offense rehabilitation efforts, including those which occur *post-conviction*, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." *Id.* at 80 (emphasis in original). These rehabilitation efforts must be remarkable, "indicate real, positive behavioral change," and demonstrate the defendant's "commitment to repair and rebuild" his or her life. *Id.* at 81; *see also United States v. Hancock*, 95 F. Supp. 2d 280, 287 (E.D. Pa. 2000) (declining to grant a *Sally* departure based on defendant's post-offense work record, where defendant was a college graduate and held noteworthy employment prior to arrest); *United States v. Kane*, 88 F. Supp. 2d 408, 409 (E.D. Pa. 2000) (noting it is inappropriate to grant a departure where the defendant simply engages in good conduct consistent with pre-offense activities).

Though the District Court did not explicitly state it was departing downward on the basis of extraordinary

rehabilitation, it is clear that the court was aware that extraordinary rehabilitation was an available basis for departure pursuant to our decision in *Sally*. The District Court did state that "the record of both individuals while in custody was exemplary and reflected a concentrated attitude of rehabilitation and cooperation" and that "additional imprisonment would result in disruption of their rehabilitative efforts."

The government notes that the most recent version of the Sentencing Guidelines has been amended to forbid expressly downward departures based on post-sentencing rehabilitation. The Sentencing Commission determined that such departures were inconsistent with 18 U.S.C. §3624(b) (providing for sentence reductions due to good behavior) and impermissibly benefitted only those who were granted resentencing de novo. U.S.S.G. §5K2.19; U.S.S.G. Appendix C, Amendment 602 (effective Nov. 1, 2000). We note that the amended guidelines were not effective at the time of the sentencing of these defendants and that they work a departure from our previous rule in *Sally*. We, therefore, conclude that a *Sally* departure is available, at least in theory, to these defendants.

It is clear from the record before us, however, that the defendants here are not eligible for a *Sally* departure. Neither Yeaman or Mendenhall has introduced evidence of extraordinary rehabilitation. Mendenhall's three proffered examples of rehabilitation are not significant. First, Mendenhall's parole officer stated that his behavior was "likely aberrant and not likely to be repeated." Second, Mendenhall points out that he is attempting to become an architect. Third, after being

released from community confinement, Mendenhall sought counseling from a police lieutenant.

The statement of the parole officer hardly amounts to evidence of extraordinary rehabilitation, and Mendenhall's career change is not at all surprising, as he has a Master's Degree in architecture and would presumably have faced difficulty obtaining employment in the securities industry subsequent to his conviction. The only evidence that speaks to rehabilitation at all is Mendenhall's pursuit of counseling. Pursuit of counseling is included as a factor weighing toward proof of acceptance of responsibility under U.S.S.G. §3E1.1. The fact that it is a *factor* weighing in favor of a guideline-based departure makes it clear that standing alone, it is not "extraordinary" unless there is some evidence that it was somehow present to an extraordinary degree in this case. No such evidence is present in the record. Accordingly, we can find no basis in the record supporting a *Sally* departure for Mendenhall as he has pointed to nothing "remarkable" or "exceptional" in his rehabilitation as is required by our jurisprudence.

Turning to Yeaman, the record makes clear that he learned Spanish, participated in the prison choir, tutored other inmates, and generally behaved as a "model prisoner." As a reward for this good behavior, Yeaman was released early from his confinement at Nellis Federal Prison Camp and transferred to community confinement to serve the last few months of his original sentence. While Yeaman's activities, especially the tutoring of fellow inmates, were commendable, they do not support a finding of extraordinary rehabilitation. Before his original sentencing, Mr. Yeaman made clear that he is an individual with strong religious convictions who would

not be inclined to engage in unlawful activity in the future.[1] Yeaman's behavior subsequent to sentencing confirms this fact but also makes it clear that Yeaman's conduct has not changed significantly and could have been reasonably expected based on his previous behavior. Insofar as the District Court concluded that extraordinary rehabilitation occurred in Yeaman's case, it abused its discretion. There is nothing about Yeaman's post-sentencing conduct that sets it outside the heartland and makes it a basis for a *Sally* departure.[2]

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[1] Relatedly, we note the following statement by the District Court:

> Since [defendants'] release they have, by all accounts, been model, productive citizens, resulting in numerous letters of support from relatives, friends, employers and community members. Any additional imprisonment would result in disruption of their rehabilitative efforts, their relationships with family members, which have been strained and are now being strengthened, and would cause substantial economic hardship on the defendants and their families.

The letters mentioned were made part of the appendix, presumably in support of Yeaman's claim of extraordinary rehabilitation. The majority of these letters simply indicate that Yeaman's family and community believe he is a good person and believe he has been punished sufficiently. Such sentiments, though attesting to Yeaman's many admirable qualities, do not form an adequate basis for downward departure under the Sentencing Guidelines. *Accord* U.S.S.G. §5H1.6 (stating that community ties are ordinarily irrelevant to sentencing); *United States v. Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996) (finding that personal worthiness does not constitute a valid basis for downward departure); cf. *United States v. Serafini*, 233 F.3d at 763 (exceptional civic and charitable contributions may form a basis for departure).

[2] Yeaman's counsel argues that *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998) is nearly on all fours supporting a down-

[footnote continued]

**2. Sentencing Disparity**

The District Court stated that "imposing what is concededly a substantial downward departure . . . would tend to make the sentences more compatible with the defendant's other cohorts in this scheme for which the defendants have been found guilty, and would more fairly level the playing field." The defendants suggest that the District Court departed downward on the basis of sentencing disparity.

We are not certain that the defendants have read the District Court's statement correctly. It is possible that the District Court was merely observing an effect of its downward departure rather than providing an additional basis for the departure. If it were true that this were a basis for departure, however, we would not be able to sustain such a basis on these facts. The record makes it clear that two of the defendant's cohorts received sentences more severe than those properly applicable to Yeaman and Mendenhall.[3] Additionally, the government makes a compelling argument that the variation in sentences between the defendants here and their co-defendants may be explained by the fact that all co-

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ward departure. *Green* involved a 14-level downward departure for a person convicted of a marijuana-related offense in California, who served 3000 hours of community service, and in addition made himself "available for daily tutoring, weekend special events, out therapy program, and was instrumental in starting Saturday computer training programs." *Id.* at 1208. This kind of involvement might be seen as extraordinary and is distinguishable from Yeaman's conduct, which does not demonstrate extraordinary *initiative* or *change* in behavior.

[3] Alan Teale pled guilty and was sentenced to seven years in Pennsylvania, and then ten years consecutively in Alabama. He died in prison. Charlotte Rentz pled guilty and was sentenced to six years in Pennsylvania and an additional seven years in Alabama.

defendants presented by the defendants pled guilty and many of them ccoperated with the government's investigation and prosecution. Generally, disparities in sentences among co-defendants do not constitute a valid basis for downward departure in the absence of any proof of prosecutorial misconduct. *United States v. Higgins*, 967 F.2d 841, 845 (3d Cir. 1992). In fact, several other circuits have rejected challenges to shorter sentences for similarly situated co-defendants when the shorter sentences were a result of plea bargaining or government assistance. *See, e.g., United States v. Epley*, 52 F.3d 571, 584 (6th Cir. 1995); *United States v. Stanley*, 928 F.2d 575, 582-83 (2d Cir. 1991).

We have held that a manipulation of an indictment by the prosecution may provide a basis for a downward departure. *See United States v. Lieberman*, 971 F.2d 989, 998-99 (3d Cir. 1992). Although Yeaman and Mendenhall suggest many inconsistencies between their sentences and the sentences of their co-defendants, their arguments are based on an ambiguous comment by the District Court that makes no reference to specific facts. Lacking any findings of fact from the District Court as to which co-defendants were similarly situated and how the government committed prosecutorial misconduct, it is impossible for us to determine if and why the District Court intended to depart downward on the basis that some sentences were dissimilar. In the absence of any factual findings of specific disparities or prosecutorial misconduct, the departures challenged by the government cannot be sustained on the basis of sentencing disparity.

### 3. Family Circumstances

We note briefly that the District Court stated that reincarceration would result in "disruption of . . . [defendants'] relationships with family members, which have been strained and are now being strengthened" and "substantial economic hardship on . . . [defendants'] families." This suggests to us that family circumstances may have constituted a basis for the District Court's downward departure. Our opinion in *United States v. Sweeting*, 213 F.3d 95 (3d Cir. 2000), recognizes this basis for downward departure outside the Guidelines, but it also forecloses the possibility of any such departure on this record. *See id.* at 102 (stating that family disruption is a normal consequence of incarceration). In *Sweeting*, we denied a downward departure on the basis of extraordinary family circumstances to a single mother with five children, one of whom had a psychological impairment. *See id.* at 96-98. The evidence of extraordinary family circumstances in this case does not rise to the level that we found inadequate in *Sweeting*. We will not discuss the issue further, as Mendenhall does not urge this basis upon us and Yeaman specifically argues that family circumstances were *not* a basis for the District Court's decision.

### 4. Re-Incarceration

This leaves re-incarceration as the only possible basis for sustaining the District Court's downward departure.[4]

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[4]The defendants claim the government has waived any objection to reincarceration as a basis for downward departure, because the government, in several instances, acknowledged that the circumstances of this case were unique or unusual. We have found

[footnote continued]

Sentencing took place on January 22, 1998 and Mendenhall and Yeaman began to serve their sentences within three months of that date. Resentencing took place on April 10, 2000. At that time, Mendenhall had been released from community confinement and had been living with his family (on probation) for a period of roughly 16 months. Yeaman had served ten months in a federal prison camp and a brief term of community confinement and had been free for over a year. The District Court specifically departed downward on the basis that Yeaman and Mendenhall had served their original sentences, and that it would be "cruel" to return the defendants to prison following the completion of their original sentences.[5] Yeaman's counsel argues that we "should affirm Mr. Yeaman's sentence on [re-incarceration] alone, and need not address the other bases for departure." Appellee's Br. at 31.

A court may depart from the guidelines sentence if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S.S.G. §3553(b). Departures should be "highly infrequent," *Koon*, 518 U.S. at 96; *see also Serafini*, 233 F.3d at 779 (Rosenn, J., dissenting in part and concurring in part) ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction,"

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multiple instances in the record where the government made clear that it is opposed any downward departure in this situation. The government does not, however, contest the theoretical possibility of a downward departures based on reincarceration in some other factual situation.

[5] Again we observe that Mendenhall was never incarcerated, but served 10 months in community confinement.

citing Ronald Dworkin, *Taking Rights Seriously* 31 (1977)).

The Supreme Court has endorsed a four-step test for determining whether a departure from the Guidelines should occur based on unusual circumstances. *See Koon*, 518 U.S. at 95. First, we determine if the factor relied upon in the case makes it special or unusual, taking it outside the heartland. Second, we determine whether departures on such factors have been forbidden by the Commission. Third, we determine whether the Commission has encouraged departures based on such factors. Fourth, we determine whether the Commission has discouraged departures based on such factors. *Id.*

We conclude that the claims of Yeaman and Mendenhall stumble on the first step of *Koon*. The defendants here present no unusual circumstances that move their situation outside the heartland. The Sentencing Guidelines promote two central Congressional objectives. First, they promote a vertical sentencing uniformity by identifying an appropriate sentencing range for any given crime in light of the goals of sentencing. Second, they promote a horizontal uniformity in sentencing by requiring that similarly situated defendants are sentenced similarly. *See* U.S.S.G. Ch. 1. Pt. A. §3 (policy statement). Under the Guidelines scheme, the calculated sentence is presumed to be the standard sentence for typical cases within the "heartland." As the lower end of the sentencing range cannot be bridged without some basis for downward departure, we can conclude that it must identify the minimum sentence required in the heartland case to satisfy the goals of general deterrence, specific deterrence, retribution, and rehabilitation. *See* 18 U.S.C. §3553(a) (setting forth the goals of sentencing).

In a system administered by human beings, errors are inevitable.[6] Errors under the Sentencing Guidelines result in breaches of the intended uniformity, however, and error correction is essential to attaining the twin goals of the Guideline scheme. Accordingly, the Guidelines contemplate the correction of errors through appellate review. *See* U.S.S.G. Ch. 1 Pt. A. §2; 18 U.S.C. §3742(b)(2). The correction of errors in sentencing necessarily involves reincarceration in that class of cases where the sentence imposed was less than it should have been and as a result, the defendant has been released prior to the correction of the error.

The District Court here held that reincarceration in and of itself constitutes an aggravating or mitigating factor not adequately taken into account by the Guidelines scheme. We cannot agree. Rather, reincarceration as a means to correct error is inherent in the process of Guideline sentencing. Indeed, as we have indicated, the correction of error through reincarceration provides the only means of preserving the appropriateness and uniformity of sentencing.

Accepting the District Court's view that error correction through reincarceration places a case outside the heartland would require us to endorse the proposition that the original imposition of unduly lenient sentences can entitle defendants in Yeaman's and Mendenhall's positions to sentences that do not conform to the intended uniform pattern. Such an endorsement would not only be inequitable and inconsistent with Congressional intent, it would also produce the greatest deviation from the desired uniformity in those cases where the original

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[6] *See* Alexander Pope, *An Essay on Criticism*, part ii, line 325 (1711) ("To err is human . . ..").

errors are the most egregious. Permitting a downward departure to avoid reincarceration where an erroneously lenient sentence is successfully appealed would have the perverse effect of compounding judicial error. The more egregious the error of a District Court at an original sentencing, the more likely that error would become irreversible. If, for example, the District Court in this case had misinterpreted the proper guidelines sentence as requiring only four years imprisonment for each defendant, no departure would have been available under the District Court's theory. Only when the error is most egregious does this theory support departure. We are especially hesitant to adopt a rule that creates such dubious inversions.[7]

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[7] In support of its view, the District Court made reference to this Court's opinion in *United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996). In that case, we reversed an erroneous sentence of home confinement that should have been a sentence of three years incarceration. In the course of our opinion, we suggested that on remand the District Court might consider whether a departure would be appropriate:

> [W]e note that Romualdi has apparently completed his service of the most stringent part of the sentence imposed by the district court, i.e. home confinement for six months. On remand, the district court may want to consider whether this is a factor that would warrant departure.

*Id.* at 977.

We read this language as suggesting that in the absence of any compensation under the guidelines for time erroneously served in home confinement, such confinement might possibly be credited to the defendant through a downward departure mechanism at resentencing. *See* 18 U.S.C. §3585(b) (providing that a defendant shall be given credit toward the service of a term for any time spent previously in federal custody); *Edwards v. United States*, 41 F.3d 154 (3d Cir. 1994) (holding that home confinement is not official detention for the purposes of 18 U.S.C. §3585(b)).

*Romauldi* thus has no bearing on cases like the ones before us where the defendants will receive full credit for the time they

[footnote continued]

We hold only that error correction through reincarceration cannot alone take a case outside the heartland. We do not rule out the possibility that extraordinary circumstances surrounding reincarceration or extraordinary effects of reincarceration in a particular case may provide a basis for departure just as the circumstances and effects of an origianl incarceration, if sufficiently extraordinary, can constitute a basis for a downward departure. *See United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (downward departure for "extreme vulnerability" during incarceration). Yeaman and Mendenhall, however, present no extraordinary circumstances or effects of reincarceration moving their cases beyond the heartland.

Under the Guidelines a sentence for Yeaman of at least eight years and one month and a sentence for Mendenhall of at least five years and three months are deemed necessary to serve the Congressionally declared objectives of sentencing and the goal of uniform treatment of similarly situated defendants. Any departure from those *minima* must be justified by extraordinary circumstances placing their cases beyond the heartland and must be consistent with the objectives of the Guidelines. *U.S. v. Gomez-Villa*, 59 F.3d 1199, 1202 (11th Cir. 1995); *U.S. v. Ullyses-Salazar*, 28 F.3d 932, 938 (9th Cir. 1994). We are unwilling to hold that the original imposition of unduly lenient sentences and the resulting necessity of reincarceration of the defendants following correction of those sentences can justify the fourteen month and ten month sentences here under review.

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have served and the sole issue is whether reincarceration for error correction can alone move the defendant's case outside the heartland.

## III.

We will reverse the judgment of the District Court and remand for resentencing in a manner consistent with this opinion.

*NYGAARD*, J., dissenting in part:

I agree with my colleagues that the District Court erred by relying upon the sentencing disparities between appellants and their co-defendants as a basis for downward departure. Further, I reluctantly agree that reincarceration, even where, as here, it is wholly unnecessary and antithetical to the historical purposes of criminal law and penology, in and of itself does not take this case out of the heartland. However, in contrast to the Majority, I do not think the District Court abused its discretion by departing downward on the basis of extraordinary rehabilitation. Accordingly, I would affirm the District Court on this issue, but remand the cause for it to determine if the departure is reasonable on this basis alone.

With respect to Mendenhall, the Majority contends that his three proffered examples of rehabilitation are not significant. Maj. Op. at 6. It finds nothing extraordinary about his conduct on parole, his career change, or his participation in counseling. I disagree with the Majority's characterization of Mendenhall's efforts and agree with the District Court that, when considered together, they amount to remarkable change. First, Mendenhall's work with probation was far above average. His supervising parole officer reported that during his supervised release, Mendenhall "performed admirably."

"Admirable" is not synonymous with "average" or even "well." It connotes something distinct and exceptional. The Majority overlooks this highly complimentary statement altogether in assessing the merits of Mendenhall's conduct while on parole.

Mendenhall's parole officer also stated that "based on Mr. Mendenhall's performance while on supervision, I would venture to opine that his criminal conduct is likely aberrant and is not likely to be repeated." The Majority fails to attach much, if any significance to this statement. Without explaining why, it quickly finds that "this statement hardly amounts to evidence of extraordinary rehabilitation." Again, I disagree.

Given the dismal statistics regarding recidivism, the Parole Officer's observation and opinion indicates something truly unique and remarkable. It demonstrates that Mendenhall did not just comply with the requirements of his parole and avoid violations. More importantly, he displayed a sincere, genuine desire to change his life. This conduct and earnestness, although the highest goal of corrections, is unfortunately rare among convicted offenders. Mendenhall left a marked impression on the parole officer. I accept the District Court's finding that Mendenhall's behavior was exceptional.

Next, I believe Mendenhall's pursuit of architecture reflects a "real, positive change in behavior." A letter from his current employer states that Mendenhall "accepts responsibility and deadlines, has shown integrity, and has a true desire to increase his professional skills and become a fully licensed architect. His talent, moral ethic, and people skills would make Nolan hard to replace." Mendenhall did not begrudgingly change careers. Rather, he approached his new job with a positive attitude and worked hard to achieve suc-

cess. This was not required by the criminal justice delivery system. Mendenhall's success, not only his work-product but also his workplace relationships, reflects an inner desire and a commitment to move forward with his life and to do so in a moral, lawful manner. His attitude indicates extraordinary rehabilitative efforts.

Finally, Mendenhall's participation in therapy exemplifies the exceptional nature of his rehabilitation. For example, Mendenhall initiated therapy sessions on his own, without any prompting from the court. He did this because he wanted to "improve his marriage, his ability to be a better father, and to learn from his mistakes that he had made in the past." Additionally, Mendenhall began therapy before he knew that he faced resentencing, thus demonstrating his sincerity. As his therapist stated, "[w]orking with forensic populations on a frequent basis, I was impressed that he voluntarily came forth, willing to examine his past patterns of behavior at a time in which there did not seem to be a compelling need to impress a judge or other sentencing authority." Moreover, Mendenhall did not merely show up for therapy. He was an active participant, willing to work through difficult issues and examine his conduct. In essence, he recognized that he needed help, and took responsibility for his actions. His therapist described him as "genuinely motivated to become a more moral and effective person and to forever avoid situations that have historically proven to be high risk" and as someone who "is concerned about morals and the implications of his conduct."

Despite these accolades, the Majority summarily concludes that there is no evidence to suggest that counseling was "somehow present to an extraordinary degree

in this case." In my view, this minimizes Mendenhall's participation and achievements in therapy and fails to appreciate the important distinction between openly engaging in therapy and merely showing up with old attitudes intact. Many offenders do the latter in order to meet a requirement; they "fake it to make it" without any intention of looking inward and questioning their behavior. Mendenhall did just the opposite. If his efforts were not outside of, or beyond, the ordinary then I am not certain what is. Accordingly, I conclude that Mendenhall's voluntary participation in therapy, coupled with his "admirable" conduct on parole and in his new job, amount to extraordinary rehabilitation.

Similar to Mendenhall, I also think that Yeaman has made "concrete gains toward turning his life around." The Majority acknowledges that Yeaman's conduct was commendable but nonetheless rejects a finding of extraordinary rehabilitation. In my view, the Majority overlooks the unique nature of Yeaman's accomplishments and sets the threshold for extraordinary rehabilitation too high. First, Yeaman went "above and beyond" what was required of him in prison. Aside from being a "model prisoner" with no discipline record, Yeaman became actively involved in the prison community and focused his energies upon helping others. For example, he joined the prison choir and completed Spanish, public speaking courses, and other college courses. Moreover, he tutored inmates who spoke only Spanish. Additionally, Yeaman consistently received outstanding performance reviews for his work as a janitor. His reviews also reveal that Yeaman had a positive attitude while incarcerated.

Yeaman's letters to family and friends reflect his desire to help others while incarcerated. For example, in one letter, he explained:

> It has been exactly one month since I . . . presented myself for incarceration. It seems bizarre to me that I'm a 'prisoner.' Rather, I've adopted the philosophy that I'm a 'volunteer.' I can leave really anytime I want to, yet I'm an inmate. Since I'm a volunteer, I then believe that I should do the best at whatever I'm supposed to be volunteering to do. Most of the inmates spend a lot of time hiding from the prison guards and doing the least amount of work possible. I believe that regardless of the terms of my employment, I should do the best that I can.

J.A. at 365. In another letter, he stated:

> As it turns out this is a period of reflection; of redirecting one's life and contemplating one's future. From that standpoint, this experience has been good for me. And, to the extent that I am able to help others do the same, it is also good. So, the time is passing very quickly now and I am very involved in meeting people and participating in activities.

J.A. at 367.

Helping others in the prison setting is certainly not mandatory. Indeed, active, *positive* involvement in the prison community is rare. In *United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000), the Court of Appeals for the First Circuit recognized how uncommon it is for prison inmates to focus their efforts on educating others. In that case, the Court affirmed a downward departure for extraordinary rehabilitation because, compared with other inmates whose efforts were focused on self-improvement, the defendant's efforts were substantially concerned with others as well. *See Bradstreet*, 207 F.3d

at 83. We have never held that assisting and educating others may serve as a basis for extraordinary rehabilitation. I would. I think such conduct falls within the general definition of extraordinary rehabilitation that we set forth in *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997). That is, it reflects a "truly repentant defendant[ ]" who has a "demonstrated commitment to repair and to rebuild [his] li[fe]." *Sally*, 116 F.3d at 80. Accordingly, I believe that Yeaman's "volunteer" approach, i.e., his efforts to help Spanish-speaking inmates learn English and his positive presence and involvement in the prison community, demonstrate remarkable strides toward changing his life.

Next, Yeaman's shift in attitude during his prison stay also supports a finding of extraordinary rehabilitation. In letters to family and friends, Yeaman recognized his own shortcomings and accepted responsibility for his actions. Further, he expressed a desire to change his life. He stated:

> Shortly after I got here, I was told by most of the inmates various ways to get through the system with minimal work and not antagonizing the Prison staff. I questioned myself about how I was going to feel about myself under such circumstances and decided that if nothing else, I wanted to come out of here with more integrity that I came in with. I wasn't going to let the system create a scenario where I compromised my values to become like someone's expectations of me.

J.A. at 366.

Yeaman also began cooperating with the United States Government for the first time. In the past, Yeaman "butted heads with the United States Government, and . . . tested the regulators in Washington and

throughout the country continually." J.A. at 171. However, after his conviction, he accepted the government's authority. Along with his conduct in prison, I think Yeaman's change in attitude also supports a finding of rehabilitation.

The Majority believes that Yeaman's attitude and behavior did not significantly improve. It reasons that Yeaman is a man of strong religious convictions and thus his attitudes and behaviors during his incarceration and supervised release could be reasonably expected. I disagree.[1] Although Yeaman professed strong religious beliefs before his confiction and incarceration, he did not apply them in his own life. He committed a serious crime involving fraud and deceit. However, while in prison and after his release, Yeaman demonstrated a genuine commitment to moral principles and values. He is living his life differently than he did before

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[1]The Majority's reasoning suggests that, as a defendant's level of insight, capability, and skill prior to conviction increase, his chances of achieving post-conviction "extraordinary rehabilitation" decrease, because rehabilitative efforts are "expected" from such a defendant. Thus, under the Majority's rationale, less troubled defendants need to do *more* to reach the goal of extraordinary rehabilitation than defendants with few to no skills and highly negative attitudes and behaviors. In my view, this approach unfairly punishes the former. A defendant's positive behaviors and strengths prior to conviction do not negate his postconviction "commitment to repair and rebuild" his life or render his postconviction behavioral changes less real or significant. Our "definition" of extraordinary rehabilitation simply requires a "truly repentant defendant" who has made "concrete gains toward turning his life around." *Sally*, 116 F.3d at 81. Yeaman and Mendenhall have demonstrated the requisite gains for extraordinary rehabilitation. Indeed, the record shows that it is highly unlikely that they will commit another crime. This type of rehabilitation is extraordinary for any criminal to achieve, regardless of his previous background.

his incarceration. He has not violated the terms of his supervised release and is now successfully managing a cattle ranch. This sort of notable change should not be underestimated. In this case, it indicates an extraordinary effort at rehabilitation.

Finally, it should be noted that a sentencing court has broad discretion in determining whethter to grant a downward departure, because it alone has the full flavor of the trial or plea, and all prior proceedings. Thus, it can gauge the full effect of its sentences upon offender and victim alike. As the Supreme Court stated: "A district court's decision to depart from the Guidelines . . . will in most cases be due to substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 2046 (1996). Applying this deferential standard to the present case, I think the circumstances relied upon by the District Court are well within the "outside permissible limits" of extraordinary rehabilitation and are commensurate with circumstances "found exceptional in existing case law." *United v. Serafini*, 233 F.3d 758, 772 (3d Cir. 2000). As noted above, both Yeaman and Mendenhall distinguished themselves from other inmates and took concrete steps toward changing their lives. Therefore, I do not think the District Court abused its discretion by departing downward for extraordinary rehabilitation.

The Majority had no need to address the extent of the District Court's departures because it rejected extraordinary rehabilitation altogether. Because I think a departure is permissible, I will briefly discuss my views on the penological reasonableness of the court's departure.

We have long been guided by the standard of 18 U.S.C.A. §3742(e)(3), which directs a District Court to impose a sentence "sufficient but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Paragraph (2), in turn, lists four purposes of sentencing, which include the need:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

*Id.* §3553(a)(2). I believe we should return to the purposes of sentencing, and attempt to make sense of what we are trying to accomplish whenever we are called upon to review a sentence, or as here, determine whether the extent of a court's sentencing departure was reasonable.

The first purpose of sentencing is to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment. In this case, we have empirical evidence that this purpose has been met. The sentence and time already served have brought about a remarkable rehabilitation in these two individuals, who are now leading exemplary lives. The evidence of record indicates that they have indeed developed a respect for the law. Both Yeaman and Mendenhall exhibited model behavior while confined, took steps to change their careers, accepted responsibility for their illicit conduct, and sincerely apologized. If all offenders left confine-

ment as these two have, we could fold our tents. A criminal justice delivery system could not hope for better results.

The second purpose of sentencing is to afford adequate deterrence to criminal conduct. Yeaman and Mendenhall have already served time. They have been punished. Sending them back to prison for a longer term would not enhance the deterrent effect of their original sentences. It is widely recognized that the *duration* of incarceration provides little or no general deterrence for white collar crimes. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 12 (Jan. 1999). For individuals committing these types of crimes, the probability of being apprehended and incarcerated is a powerful deterrent in of itself, because the "disutility of being in prison at all and the stigma and loss of earning power may depend relatively ligtle on the *length* of imprisonment." *Id.* at 12 (suggesting that "less than-maximal sanctions, combined with relatively high probabilities of apprehension" is "optimal" for white collar crimes). Thus, there is not a scintilla of evidence here that longer sentences will deter anyone from committing mail and wire fraud.[2] It is mere speculation. Hence, I cannot say the District Court abused its discretion by finding that this condition was met.

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[2] I cannot help noting in the margin that upon Robert Downey Jr.'s re-arrest following a year's sentence in prison, he said "*[t]he threat of prison has been eliminated for me. I know I can do time now.*" Claudia Puig & Kelly Carter, *Are Awards Good for Downey? Hollywood's Attention May Not Help Actor Kick Drug Habit*, U.S.A. Today, March 15, 2001, at D1. So much for punishment and prison as a deterrent!

The third purpose of sentencing is to protect the public from further crimes by the defendant. In this case, there is absolutely no evidence that either Yeaman or Mendenhall would commit further crimes. Indeed, here we have expert opinion to the contrary, stating that this behavior is "not likely to be repeated." And as explained above, Yeaman's and Mendenhall's rehabilitative efforts were extraordinary: They did more than "they were supposed to do" and made "concrete gains toward 'turning [their lives] around.' " *Sally*, 116 F.3d at 81. Based upon their records and the evidence in this case, the most likely conclusion is that Yeaman and Mendenhall will never commit fraud or any other crime again.

The fourth goal of sentencing is to provide needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. No one even argues that Yeaman or Mendenhall need such services.

I believe that a departure serves the historical, penological, and statutory purposes of sentencing, even as set forth in the Guidelines. Yet, under the Majority's mandate, Yeaman and Mendenhall will be returned to prison, perhaps for as many as four years – at a cost to the U.S. taxpayer of roughly a quarter of a million dollars. To me this case illustrates the sheer folly and utter nonsense of offense-based theory, and the need to use corrections-based sentencing. There is not a shred of evidence that either Yeaman or Mendenhall need reincarceration. No penologist could hope for better results from the criminal justice delivery system than these repentant, rehabilitated, and now fully functioning and productive individuals.

In closing, I find the quote from Pope's *An Essay on Criticism*, a bit ironic. *See* Maj. Op. fn. 6. The full strain of Pope's quote, however, is instructive. It reads:

> Good nature and good sense must ever join,
> To err is human, to forgive, divine.

Because it is human to err, we must employ our good sense and nature, and rise to forgiveness. I cannot see that we have. If ever there is a place where good nature and good sense are *not* conjoined, it is in the U.S. Sentencing Guideline scheme – a mechanical construct that is devoid of feeling. Forgiveness could not possibly have been a flicker in its framers' eyes. One of the primary goals of sentencing outlined in Section 3742(e)(3) is to "provide just punishment for the offense." But, law divorced from common sense is seldom just. In my view, this case is no exception.

Hence, I respectfully submit this concurrence and dissent.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX C

[A TRUE COPY CERTIFIED TO
FROM THE RECORD,
Dated: 4-17-2000 – Attest: /s/ [Illegible]]

[Page 1 of 7]

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania

UNITED STATES OF AMERICA

V.

DAVID REX YEAMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

Case Number: 2:96CR00051-3

Frank C. Razzano
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court

X was found guilty on count(s) 1, 2 to 4, 7, 8, 13, 15 and 17
after a plea of not guilty.

*Title & Section:*
18 U.S.C. 371

*Nature of Offense:*
Conspiracy to Commit Wire and Securities Fraud.
*Date Concluded:*
6/30/1992
*Count Number(s):*
1
*Title & Section:*
18 U.S.C. 1343
*Nature of Offense:*
Wire Fraud and Aiding and Abetting
*Date Concluded:*
6/30/1992
*Count Number(s):*
2, 3, 4, 7, and 8
*Title & Section:*
15 U.S.C. 77(q)
*Nature of Offense:*
Fraud in the offer and sale of Stock & Aiding Abetting
*Date Concluded:*
6/30/1992
*Count Number(s):*
13, 15 and 17

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 5 and 6

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec.: 518-54-2473

Defendant's Date of: 12/7/1946

Defendant's USM No.: 01637-081

Defendant's Residence Address:
8818 S. Renegade Rd.
Sandy, Ut. 84093

Defendant's Mailing Address:
8818 S. Renegade Rd.
Sandy, Ut. 84093

Date of Imposition of Judgment: April 10, 2000

Signature of Judicial Officer: /s/ Clarence C. Newcomer

Name and Title of Judicial Officer: Clarence C. Newcomer, Senior Judge

Date: Signed April 13, 2000

Assistant U.S. Attorney: Andrea Foulkes

U.S. Probation Officer: Hector O. Santana

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DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR0051-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Time Served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

_____ [Page 3 of 7]

DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR0051-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 Years

The defendant shall report to the probation office in the district to which the defendant is released within 72

hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. §921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district

without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the inntructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

———————— [Page 4 of 7]

DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR0051-3

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release;

2. The defendant shall provide the probation officer with access to any requested financial information;

3. The defendant shall refrain from engaging in the securities/insurance industries;

4. Jurisdiction and supervision of this case shall be transferred to the District of Utah; and

5. Within two weeks of this judgment, the defendant is to make a $400,000.00 restitution payment. Then the

defendant shall make six (6) quarterly payments of $185,000.00 to commence from April 10, 2000.

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DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR00051-3

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on on Sheet 5, Part B.

*Totals:*

*Assessment:*
$450.00

*Fine:*
$20,000.00

*Restitution:*
$1,500,000.00

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $_____

## FINE

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

☐ The interest requirement is modified as follows:

## RESTITUTION

☐ The determination of restitution is deferred until ____ _____. An Amended Judgment in a Criminal Case will be entered after such determination.

X The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

*Name of Payee:*
Statutory Liquidator for World Life Ins. Co.
901 N. 7th Street
Harrisburg, Pa. 17102

**Total Amount of Loss:*

*Amount of Restitution Ordered:*
$1,500,000.00

*Priority Order or Percentage of Payment:*
100%

*TOTALS:*
*Amount of Restitution Ordered:*
$1,500,000.00

*Findings for the total amount of losses are required under Chapters 109A, 110, 100A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR0051-3

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payments of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ In full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C X not later than: 10/10/2001; or

D ☐ in installments to commence ____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in ____ (*e.g., equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

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DEFENDANT: DAVID REX YEAMAN
CASE NUMBER: 2:96CR0051-3

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary):

**Guideline Range Determined by the Court:**

Total Offense: 11
Criminal History: I
Imprisonment: 8 to 14 months

Supervised Release: 2 to 3 years
Fine: 2,000.00 to $20,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3363(d).

☐ For offenses committed on or after September 13, 1994 but before April 23 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

X The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

X for the following specific reason(s):

See transcript.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Action Nos.: 96-51-03

UNITED STATES OF AMERICA

v.

DAVID REX YEAMAN

ORDER AMENDING AND CORRECTING JUDGMENT

The Judgment in a Criminal Case for the above-captioned matter signed April 13, 2000 is hereby amended and corrected as follows:

- On the first page, the Defendant's Residence Address is changed to 8281 North Trail Dr., Park City, Ut. and the Defendant's Mailing Address is changed to 279 N. Spring Ridge Dr., North Salt Lake City, Ut. 84054.
- On the fourth page, the second sentence of item 5 is changed to the following: "Then the defendant shall make six (6) quarterly payments of $185,000.00 until the full $1,500,000.00 restitution amount is paid (such that the sixth (6th) payment shall be $175,000.00), to commence six (6) months from April 10, 2000."
- On page 6 of 7, the date in item C is changed to 1/10/2002.

IT IS SO ORDERED.

4-26-00

/s/ Clarence C. Newcomer
United States District Court Judge

## APPENDIX D

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1498, 00-1500

THE UNITED STATES OF AMERICA,
Appellant in Nos. 00-1498 and 00-1500

v.

DAVID REX YEAMAN, Appellee in No. 00-1498
NOLAN LEIGH MENDENHALL,
Appellee in No. 00-1500

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cr-00051-3 and
96-cr-00051-6)

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SUR PETITION FOR REHEARING

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BEFORE: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY,
AMBRO, FUENTES, STAPLETON, *Circuit Judges*,
and DEBEVOISE, *Senior District Judge*[1]

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[1] The votes of Judge Stapleton and Judge Debevoise are limited to panel rehearing only. See Third Circuit I.O.P. 9.5.3.

The Petition for rehearing filed by Appellees in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

Judge Nygaard would have granted rehearing en banc.

It is so ordered.

By the Court,

/s/ Edward R. Becker
United States Circuit Judge

DATE: JUN 18 2001

## APPENDIX E

### 18 U.S.C. § 3553 (a & b)

**§3553. Imposition of a sentence**

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title

28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994-(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a

petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

## APPENDIX F

### 18 U.S.C. § 3742(e)

(e) CONSIDERATION. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for –

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

# APPENDIX G

## UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL

Effective November 1, 1987, Including Emergency Amendments Effective January 15, 1988, through November 1, 1998

## CHAPTER FIVE – DETERMINING THE SENTENCE

### Part K – Departures

### 2. Other Grounds for Departure

### §5K2.0. GROUNDS FOR DEPARTURE (POLICY STATEMENT)

Under 18 U.S.C. §3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant depar-

ture from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use

of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

*Commentary*

*The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. Dis-*

*trict Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.*

*The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant go a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.*

*In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. §3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57); November 1, 1990 (see Appendix C, amendment 358); November 1, 1994 (see Appendix C, amendment 508); November 1, 1997 (see Appendix C, amendment 561); November 1, 1998 (see Appendix C, amendment 585).